Filed 7/2/19 P. v. Gray CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. AARON MARVIN GRAY, JR., Defendant and Appellant.	E071495 (Super.Ct.No. RIF1502889) OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge. Affirmed with directions.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal, Andrew Mestman, and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

On remand for resentencing from this court,[1] the trial court dismissed the count 2 offense (Pen. Code, § 186.22, subd. (a)),[2] struck the prior serious felony conviction enhancement (§ 667, subd. (a)), struck the prior prison term enhancements (§ 667.5, subd. (b)), sentenced defendant to 25 years to life, and awarded defendant a total of 812 days of custody credit. On appeal, defendant contends the court erred in neglecting to dismiss the section 186.22, subdivision (b)(1)(B) enhancement attached to count 1; that the abstract of judgment and resentencing minute order must be corrected to reflect that the court struck the section 667, subdivision (a) enhancement; that the abstract of judgment and resentencing minute order must be corrected to reflect that the court struck, not stayed, the prior prison term enhancements; that the abstract of judgment must be corrected to reflect that the jury convicted defendant of being a felon in possession of a firearm and not a "convicted felon and narcoti[c]"; and that the court erred in failing to award defendant custody credits for the term of his imprisonment spent subsequent to the original judgment due to the modification of his original sentence. The People agree and add that the abstract of judgment must be modified to reflect the correct date of resentencing and the name of the actual deputy district attorney who appeared. The judgment is affirmed as modified with directions.

---

[1] We take judicial notice of the record in defendant's appeal from the original judgment in this case, case No. E066549. (Evid. Code, § 459.)

[2] All further statutory references are to the Penal Code unless otherwise indicated.

I. PROCEDURAL HISTORY[3]

A jury convicted defendant and appellant, Aaron Marvin Gray, Jr., of possession of a firearm by a convicted felon and narcotics addict (§ 29800, subd. (a)(1); count 1)[4] and active participation in a criminal street gang (§ 186.22, subd. (a); count 2). The jury additionally found true allegations defendant had committed both offenses while out on bail (§ 12022.1) and had committed the count 1 offense for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(B)). Defendant thereafter admitted suffering two prior prison terms (§ 667.5, subd. (b)), one prior serious felony conviction (§ 667, subd. (a)), and two prior strike convictions (§§ 667, subds. (c), (e)(1), 1170.12, subd (c)(1)).

The court sentenced defendant to a term of 25 years to life on count 1, plus five years for the prior serious felony conviction enhancement. The court imposed and stayed a two-year term on count 2, a four-year term for the gang enhancement on count 1, a two-year term for the out-on-bail enhancement, and two one-year terms for the prior prison term enhancements.

On appeal, defendant contended there was insufficient evidence to support either the gang enhancement or the count 2 active gang participation conviction. Defendant also asserted that if the gang enhancement was stricken, the prior serious felony

---

[3] The factual history of the case is irrelevant to the issues raised on appeal.

[4] In our previous opinion we noted that the People presented no evidence at trial that defendant was a narcotics addict.

enhancement would also have to be stricken. Defendant further argued the court erred in staying, rather than striking, the prior prison term enhancements. We agreed. Both parties agreed the court improperly delegated the duty to calculate defendant's custody credits to the probation department. Thus, we reversed the judgment on count 2, struck the sections 186.22, subdivision (b)(1)(B) and 667, subdivision (a) enhancements, and remanded the matter for resentencing with directions to the court to determine whether to impose or strike the prior prison term enhancements.

II. DISCUSSION

A. *The Section 186.22, Subdivision (b)(1)(B) Enhancement Attached to Count 1*

Defendant contends the court misspoke when it dismissed the enhancement attached to count 2, intending to dismiss the section 186.22, subdivision (b)(1)(B) enhancement attached to count 1. The People disagree. They assert the court simply neglected to comply with the direction in our previous opinion to strike the enhancement. We agree with the People.

At the resentencing hearing, the court stated: "[I]n this matter based on the Court of Appeal's findings I am going to dismiss Count 2. I am going to strike the enhancement that is attached to Count 2. I am going to strike the [section] 667[, subdivision] (a) [enhancement], which is listed in the Information as prior No. 3. Again the [section] 677[, subdivision] (a) [enhancement] prior is stricken and the punishment attached thereto is also stricken."

Defendant argues that because dismissal of count 2 itself would necessarily have resulted in the dismissal of any attached enhancements, the court must have misspoken. Thus, defendant asserts the court must have intended to strike the section 186.22, subdivision (a) enhancements attached to count 1. We agree with the People that it is more reasonable to read the court's language literally and conclude the court simply neglected to strike the 186.22, subdivision (a) enhancement attached to count 1 as we directed.

"When a trial court's intention is clear, we 'need not remand for resentencing, but can modify the judgment to reflect the intent of the trial court.' [Citation.]" (*People v. Mendoza* (2016) 5 Cal.App.5th 535, 539; § 1260 [appellate courts have the power to modify the judgment or order appealed from]; *People v. Hamilton* (2018) 30 Cal.App.5th 673, 685 [appellate courts have the power to modify a conviction not supported by substantial evidence and reduce the conviction to a lesser offense]; § 1181, cl. (6).) Here, the court obviously intended, but neglected, to comply with this court's order directing it to strike the enhancement. As noted in our previous opinion, no evidence now supports this enhancement. No purpose, beyond wasting judicial resources, would be served by remanding the matter yet again where the trial court has no discretion left to exercise. Thus, we shall direct the superior court clerk to prepare an amended sentencing minute order and abstract of judgment reflecting that the section 186.22, subdivision (a) enhancement attached to count 1 has been stricken.

B. *Corrections to the Resentencing Minute Order and Abstract of Judgment*

Defendant and the People agree the resentencing minute order and abstract of judgment must be modified to reflect several corrections, including the following: (1) that the court struck the section 667, subdivision (a) enhancement; (2) that the court struck, not stayed, the prior prison term enhancements; (3) that the jury convicted defendant of being a felon in possession of a firearm and not a "convicted felon and narcoti[c]"; (4) that the date of hearing should reflect the resentencing date, October 17, 2018, and not the original sentencing hearing date, July 29, 2016; and (5) that Meghan MacDonald represented the People at the resentencing hearing, not Adam Apperson who represented the People at the original sentencing hearing. We agree.

"It is well settled that '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]' [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, [appellate courts have] the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 89.) The reviewing court has the authority to correct clerical errors in the minute order. (*People v. Contreras* (2009) 177 Cal.App.4th 1296, 1300, fn. 3.)

Here, the court struck the section 667, subdivision (a) enhancement. However, the abstract of judgment reflects that the enhancement was stayed, not stricken. The minute

order reflects only that the "time (punishment) imposed on" the prior was stricken, not that the court struck the enhancement in its entirety. Thus, we shall order that the resentencing minute order and abstract of judgment be modified to reflect that the court struck the section 667, subdivision (a) enhancement in its entirety.

Here, the court stated the following regarding the prior prison term enhancements: "The two remaining priors, the People asked me to impose those, I will continue to stay those. Those two one-year priors, those would be priors 1 and 2 on the original Information. [¶] Again, and I think at least from what I understood from the Court of Appeal, I think the correct method is not to impose and stay them, but to strike the punishment for those two one-year priors."

Although the court initially indicated, again, its intention to impose an unauthorized sentence by imposing, but staying the prior prison terms (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390), the court eventually indicated it was striking the enhancements. Nonetheless, the resentencing minute order reflects that the "Court orders time imposed on Priors 1 and 2 stayed." Likewise, the abstract of judgment indicates the court imposed, but stayed punishment on the enhancements. Thus, we shall order the clerk to modify the resentencing minute order and abstract of judgment to reflect that the prior prison term enhancements were stricken.

As we noted in our previous opinion, although the People charged defendant by information with, and the jury convicted defendant of, possession of a firearm by a

convicted felon and narcotics addict, there was no evidence in the record that defendant was a narcotics addict. Section 29800, subdivision (a)(1), provides that "[a]ny person who has been convicted of . . . a felony . . . or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony." Because the evidence does not support a contention defendant was a narcotics addict, but does support that he was a felon in possession of a firearm, the abstract of judgment must be modified to reflect defendant's conviction for possession of a firearm solely as a felon. We shall direct the court to make such a modification.

As the People point out, the abstract of judgment from the resentencing hearing reflects that the hearing occurred on July 29, 2016, the date of the original sentencing hearing, instead of the actual date, October 17, 2018. Similarly, the abstract of judgment must reflect that Meghan MacDonald represented the People at the resentencing hearing, not Adam Apperson who represented the People at the original sentencing hearing. We shall direct the court to modify the abstract of judgment accordingly.

C. *Custody Credits*

Both parties agree the court failed to award defendant the appropriate number of custody credits, both by neglecting to award defendant actual custody days for the time he spent incarcerated since he was originally sentenced and by incorrectly calculating the conduct credits to which defendant was entitled. Defendant maintains the court should have awarded him 1,607 total days of custody credits consisting of 1,209 days of actual

credit and 398 days of conduct credit pursuant to section 4019. The People argue the court should have awarded defendant a total of 1,606 total days of custody credits consisting of 1,207 days of actual credit and 399 days of conduct credit. We conclude the court should have awarded defendant 1,209 days of actual credit and 399 days of conduct credit.

"[W]hen a prison term already in progress is modified . . . the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29.) "[T]he trial court, having modified defendant's sentence . . . [is] obliged, in its new abstract of judgment, to credit him with all *actual* days he ha[s] spent in custody, whether in jail or prison, up to that time." (*Id.* at p. 37.)

Here, at resentencing, the court only awarded defendant custody credits calculated from his arrest to the *initial* sentencing hearing date, 812 total days consisting of 406 actual and 406 conduct days. Defendant was arrested on June 27, 2015, and originally sentenced on July 29, 2016, a matter of 399 days. Thus, the court should have awarded defendant 399 days of presentence credit pursuant to section 4019. Again, defendant was arrested on June 27, 2015, and was resentenced, after modification of his original sentence, on October 17, 2018, a matter of 1,209 days. Thus, the court should have awarded defendant 1,209 days of actual credit. We shall direct the court to modify the resentencing minute order and abstract of judgment accordingly.

III. DISPOSITION

The trial court is directed to modify the abstract of judgment and resentencing minute order as enumerated herein. The court is directed to forward a copy of the new abstract of judgment and sentencing minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.